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No. 04-1055

In The Supreme Court of the United States

SAFE AIR FOR EVERYONE,

Petitioner,

v.

WAYNE MEYER, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

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American Mining Congress v. EPA,
824 F.2d 1177 (D.C. Cir. 1987) 4, 5

American Mining Congress v. EPA,
907 F.2d 1179 (D.C. Cir. 1990) 4

City of Chicago v. Environmental Defense Fund,
504 U.S. 906 (1992) 9

International Paper Co. v. Ouellette,
475 U.S. 1081 (1986) 9

United States v. Marine Shale Processors,
81 F.3d 1361 (5th Cir. 1996) 8

United States v. Self,
2 F.3d 1071 (10th Cir. 1993) 8

Statutes and Regulations:

Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* 6

Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* 6

Resource Conservation and Recovery Act (RCRA),
42 U.S.C. § 6901 *et seq.* ..... *passim*

§ 6903(27) 1, 7

§ 6924(n) 6

§ 6972 ..... 2, 7

40 C.F.R. §§ 261.4(b)(2)(i) 7

Miscellaneous

H.R. Rep. 94-1491, 94th Cong., 2d Sess. 3 (1976) 7

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REPLY BRIEF FOR THE PETITIONER

Respondents' brief in opposition strives mightily for thirty pages to obfuscate the enormity of the Ninth Circuit's misconstruction of the plain meaning of the jurisdictional terms "solid waste" and "discarded material" within the federal Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6903(27). Respondents repeatedly insist that the "undisputed" and "uncontroverted" evidence below was that their open field burning of crop residue was a "continuous part of the growth process." See, *e.g.*, Br. in Opp. i, 11, 13, 15, 16, 19 & n.17. Yet neither the "undisputed" nature of the evidence nor their proffered "continuous process" label renders this case any less deserving of this Court's review. Just the opposite. The undisputed nature of the underlying evidence simply underscores the factually-unencumbered nature of the legal issue presented. And, respondents' "continuous process" legal theory simply confirms the extent to which the decision below cannot be squared with the plain meaning of the statutory language and would upset EPA's longstanding interpretation of the term "discarded" in its hazardous waste regulations. For,

under respondents' proffered theory, any industrial activity can avoid RCRA regulation by destroying residual materials on-site within weeks of their generation. The economic value of getting rid of the material would, like the crop residue in this case, render the material's destruction a "continuous part of the [industrial] process." Because the validity of respondents' claim raises an important legal issue about which the federal courts of appeals are now in conflict, and does so in a case that highlights the immediate and compelling public health effects at stake, the petition should be granted.

1. Respondents' brief in opposition is riddled with errors,[1] but they are absolutely correct about one thing: the "undisputed" and "uncontroverted" nature of the evidence in this case. There is no dispute that after

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[1] For instance, respondents twice intimate (Br. in Opp. 5 n.5, 26) that the lower courts found that petitioner failed to prove the existence of an imminent and substantial endangerment. Respondents also fault (*id.* at 26) petitioner for purportedly "ignor[ing] the fact that EPA has never found that [respondents] have violated RCRA." Both arguments lack merit. Neither court below found the absence of an imminent and substantial endangerment. The exclusive basis of each court's decision was instead its holding that petitioner could not bring an action under Section 7002, 42 U.S.C. § 6972, no matter how strong a showing of such an endangerment, because the crop residue being burned was not a "solid waste" as a matter of law. See Pet. App. A19, n. 15, A44. The trial court expressly added that "the Court is not finding the smoke is not a pollutant or a cause of the health problems affecting the citizens in the area" and acknowledged that petitioner had offered evidence that existing air quality standards "may not adequately protect the public's health." *Id.* at A43, A44-A45. Respondents' additional reliance on the absence of an EPA finding of a RCRA violation ignores the essential function of 7002. By its express terms, the applicability of Section 7002 does not turn on any such violation. It provide citizens with judicial relief from imminent and substantial endangerments without the necessity of demonstrating an independent violation of a specific statutory requirement of RCRA or any other law. Congress understood that gaps in statutory implementation and enforcement would invariably arise, notwithstanding the seemingly comprehensive nature of federal and state environmental protection law. The congressional purpose in enacting Section 7002 was accordingly to provide the public with the judicial avenue necessary to secure emergency relief in the most exigent of circumstances. See Pet. 24.

harvesting the commercial seed, respondents dump massive amounts of crop residue on open fields. There is likewise no dispute that they leave that residue on the fields for "weeks" until they burn it. See Br. in Opp. 22. Nor is there any factual dispute that the primary and overriding economic benefits of that process of material destruction result from getting rid of the crop residue. Significantly, in this respect, respondents never dispute our central assertion throughout the petition (Pet. 2, 8, 14), introduced in the question presented, that "99.9 percent of the reason for the burning was to get rid of [the crop residue] because the material would otherwise harm crop productivity." Pet. i.

So too, we did not dispute in the petition (Pet. 16), and do not dispute in this reply, respondents' factual assertion (Br. in Opp. 6) that the burning of the crop residue increases "the productive life of a bluegrass field." Of course it does. Getting rid of the material most certainly does "expose the plant crown to sunlight, air, and moisture" by eliminating the residue that would otherwise block sunlight and rain. *Id.* Getting rid of the material does "reduce parasitic bug infection," "reduce the growth of fungi," "reduce weed growth," and "reduce the rodent population." *Id.* But here again, it accomplishes these "benefits" by eliminating crop residue that would otherwise provide a habitat for parasitic bugs to spread, fungi to grow, and rodents to seek shelter.

As demonstrated in the petition (Pet. 14-17), the mere fact that getting rid of material is economically valuable does not mean that the material is not being "discarded." Indeed, were the rule otherwise, virtually any classic waste disposal activity would fall outside the plain meaning of "discard." There is always an economic advantage to getting rid of waste material. After all, that is why businesses get rid of it.

2. Equally unpersuasive is respondents' attempt to escape RCRA's plain meaning by characterizing its open field burning of crop residue as akin to a "continuous industrial process." See Br. in Opp. 3, 11, 13, 19 n.17. Specifically, respondents contend that the crop residue is "used by [respondents] as part of a continuous process of

the growing of Kentucky bluegrass and is never discarded." *Id.* at 23.

RCRA's protections cannot be so easily evaded by rhetorical legerdemain. All ongoing industrial activity is "continuous." And, all industrial activity, just like that of respondents in this case, requires classic waste disposal activity as part of its continuous industrial process. Otherwise, the waste material being generated would, just like respondents' crop residue, impede the ongoing industrial activity. But the continuing need to discard waste material in any ongoing business, whether by burning or otherwise, does not immunize that solid waste from RCRA regulation.

Instead, as elaborated by the petition (Pet. 5-6, 18-19, 20-23), EPA reached just the opposite conclusion in construing the meaning of "solid waste" and "discarded material." EPA rejected a broad exemption for on-site reuse and recycling of secondary materials. EPA has instead created only a very narrow exception from RCRA regulation for certain kinds of "continuous industrial processes," typified by closed loop industrial processes that immediately reuse those secondary materials as effective substitutes for raw materials. See, *e.g.*, American Mining Congress v. EPA, 824 F.2d 1177, 1185 (D.C. Cir. 1987); American Mining Congress v. EPA, 907 F.2d 1179, 1186 (D.C. Cir. 1990). While substantial uncertainty persists in the application of that narrow regulatory exception to certain types of industrial processes (Pet. 28 & n.24), there is no such ambiguity concerning its inapplicability to respondents' activity. Under EPA's regulations, burning for material destruction falls completely outside any possible exclusion. And, in no manner can *open* field burning be equated with a *closed* loop, particularly because the justification for the latter's regulatory exclusion is the absence of ambient environmental risks created by activities that are "closed." See Pet. 6. By contrast, as illustrated by the facts of this case, open field burning creates the kind of adverse spillover effects that trigger the need for regulatory oversight. As the petition explains (Pet. 6), EPA has expressly classified such activities, regardless of their

recycling nature, as waste disposal activities subject to RCRA.

3. Respondents' invocation of a purported "continuous process" exclusion also reveals the hypocrisy of their repeated claim that the meaning of "solid waste" as applied to EPA's hazardous waste program is "inapplicable" and "entirely irrelevant" to this action. Br. in Opp. 17, 24, 25. Respondents' exclusive support for their theory of a "continuous process" exclusion is, in fact, court of appeals opinions reviewing the merits of EPA's hazardous waste regulations in general and their definition of "solid waste" and "discarded material" in particular. Hence, respondents argue that the D.C. Circuit's ruling in *American Mining Congress v. EPA*, 824 F.2d 1177 (1987) that certain kinds of continuous industrial processes fall outside the scope of EPA's regulatory definition of discarded material is "*applicable* to this matter." Br. in Opp. 20 (emphasis added).

As described above, respondents are incorrect in their effort to apply EPA's narrow regulatory exclusion to their open field burning, but they are completely correct in their acknowledgment of the relevance of the Ninth Circuit's ruling to the scope of EPA's hazardous waste regulation.[2] As the brief in opposition concedes (Br. in Opp. 4 n.4), "if a substance is not a solid waste, it cannot be a hazardous waste." For this reason, as the petition explains in detail (Pet. 14-25), the Ninth Circuit's narrow interpretation of the plain meaning of the statutory definition of "solid waste" necessarily implicates EPA's jurisdiction over

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[2] Respondents' reliance on the fact that the Ninth Circuit "did not rely upon any definitions set forth in EPA's hazardous waste regulations" is likewise misplaced. See Br. in Opp. 25, 29. The Ninth Circuit did not cite directly to those hazardous waste regulations, but the court of appeals certainly acknowledged their legal relevance. The court repeatedly cited and discussed several court of appeals decisions in which the only issue was the validity of EPA's regulatory definition of "discarded material" in its hazardous waste program. See Pet. App. A9-A12. The Ninth Circuit characterized these judicial decisions concerning the meaning of solid waste as applied in EPA's hazardous waste program as "helpful" and "relevant" to its analysis. *Id.* at A9, A12.

hazardous wastes. If, as the Ninth Circuit ruled and respondents continue to argue, the plain meaning of "discarded material" cannot extend to material destruction that occurs on an ongoing and continuous basis, much of EPA's ability to regulate classic hazardous waste treatment and disposal will be eliminated.[3]

4. Implicitly acknowledging the weakness of the rulings below, respondents alternatively argue (Br. in Opp. 1, 3-5, 26) that their open field burning falls outside of RCRA either because the resulting air pollution is exclusively regulated by the federal Clean Air Act or because Congress somehow exempted the "[a]ge-old practice of agricultural burning" from RCRA regulation. Neither claim, however, stands as an obstacle to review because neither served as a basis for the ruling below. But, in all events, both lack merit.

First, as explained in the petition (Pet. 23-24), RCRA contains no such statutory exclusion for activities potentially subject to Clean Air Act air emissions controls. Not only does RCRA itself independently regulate air emissions of certain waste management activities such as incineration (see 42 U.S.C. § 6924(n)), but Congress demonstrates elsewhere in RCRA that it knows how to make clear its intent to exclude from the RCRA definition of "solid waste" specific activities regulated by another federal environmental protection law. See 42 U.S.C. § 6903(27) (excluding from "solid waste" certain material permitted under the Clean Water Act).

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[3] As the petition also explains (Pet. 22-23), the fact that EPA has made clear that its regulatory definition of "solid waste" is narrower in the hazardous waste context than it is for the statute as a whole does not, contrary to respondents' assertion, make the ruling below less significant. While a narrow construction of EPA's regulatory definition would not necessarily affect the broader meaning of the statutory definition of solid waste, a narrow construction of the statutory definition of solid waste does necessarily control and limit the reach of the regulatory definition. In this case, the court of appeals did just that; by narrowly construing the plain meaning of the statutory definition of "solid waste," the court has necessarily curbed EPA's authority to define solid waste within its hazardous waste program as well.

Nor does RCRA contain the exemption for agricultural activity claimed by respondents.[4] Although respondents twice (Br. in Opp. 5, 26) appear to be quoting from Congress in stating that "Congress specifically declared that 'agricultural products that could be recycled or reused as fertilizers were *not* its concern,'" those are not Congress's words. The quoted language is nothing more than the court of appeals' characterization of one sentence in a legislative report. See Pet. App. A17. When, moreover, Congress in fact spoke in the only manner that it authoritatively can – in the words of the statute itself – Congress left no doubt that no such agricultural exemption exists. RCRA expressly defines the meaning of "solid waste" as "discarded material" including material from "agricultural operations." 42 U.S.C. § 6903(27). In all events, as explained in the petition (Pet. 17-18), EPA's authoritative regulations make quite clear the Agency's view that secondary material generated by "[t]he growing and harvesting of agricultural crops" and then "returned to the soil as fertilizers" is a "solid waste." See 40 C.F.R. § 261.4(b)(2)(i).[5]

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[4] Of course, not all agricultural burning triggers RCRA Section 7002 oversight. It occurs only where, as here, the extreme nature of that burning produces an imminent and substantial endangerment. In this case, the severity of the public health crisis facing residents of Northern Idaho and those in neighboring States downwind of respondents' open field burning is underscored by the filing of two amicus briefs supporting the petition. The first is by the Idaho Medical Association, representing 1800 medical care professionals, including 1600 physicians, and the second is by the American Lung Association, the nation's oldest voluntary health organization. See Amicus Curiae Br. Idaho Medical Org.; Amicus Curiae Br. American Lung Ass'n.

[5] EPA, therefore, has rejected the sweeping significance given by the Ninth Circuit to House Report language that "[a]gricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of this legislation." Pet. App. A17, quoting H.R. Rep. 94-1491, 94th Cong., 2d Sess. 3 (1976). But the lower court's reading was in all events clearly misguided because the report language does not even purport to speak to the status of materials not returned to the soil but instead, as here, burned, causing massive plumes of smoke. The resulting particulate matter entering human lungs is in no sense "returned to the soil as fertilizers."

5. Finally, respondents' attempt to establish the absence of a circuit conflict is unavailing. As demonstrated by the petition (Pet. 25-28), the Ninth Circuit's adoption of a broad exclusion to the plain meaning of "solid waste" for on-site material reuse and recycling creates a wide and deep circuit conflict. It is no matter that none of the cases that the petition cites "involve stubble, straw, or any form of agricultural materials." Br. in Opp. 18. Nor does it disturb the existence of a circuit conflict that the cases, unlike this one, generally involve hazardous wastes. The Ninth Circuit's ruling of law, promoted here by respondents' assertion of a statutory exclusion for on-site waste management activities conducted on a "continuous" basis, is not limited in its application to stubble or straw. It would equally apply to all industrial and manufacturing processes similarly susceptible to such a "continuous" label. Because, moreover, the legal ruling would necessarily extend to the application of RCRA's hazardous waste management program, it would directly conflict with the rulings of courts of appeals that, consistent with EPA's regulations, have denied the existence of any such statutory exclusion, such as *United States v. Marine Shale Processors*, 81 F.3d 1361 (5th Cir. 1996) and *United States v. Self*, 2 F.3d 1071 (10th Cir. 1993), which respondents fail even to cite, let alone discuss.

Indeed, for this same reason, respondents are completely mistaken in asserting that "[p]etitioner has not and cannot identify even a single instance in which EPA's ability to protect the public's health under RCRA has been compromised (or is likely to be in the future)." Br. in Opp. 30. Not so. As set forth in the petition (Pet. 5-6, 21-23), EPA long ago concluded that its ability to protect the public health and the environment from the dangers presented by solid and hazardous waste was entirely dependent on its authority to interpret RCRA's definition of "solid waste" as "discarded material" as extending to a broad class of material reuse and recycling activities that presented such risks. EPA further identified the activity of burning material for its destruction or its use as "fuel" as paradigmatic examples of the kind of activity that falls

within the core of the Agency's authority under RCRA. By completely undermining EPA's authority in this fundamental respect, it cannot fairly be gainsaid that "EPA's ability to protect the public's health has been compromised."

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For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.[6]

Respectfully submitted.

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[6] As stated in the petition (Pet. 30 n.25), because of the implications of the lower court's ruling for RCRA, the Court might also invite the Solicitor General to file a brief expressing the views of the United States on the question presented either after granting the petition (see International Paper Co. v. Ouellette, 475 U.S. 1081 (1986)) or instead to assist the Court's decision whether to grant the petition in the first instance (see City of Chicago v. Environmental Defense Fund, 504 U.S. 906 (1992)).